No. 83-2077

In The

Supreme Court of the United States

October Term, 1983

LARRY DIXON,

Petitioner,

vs.

LINDSEY M. SCOTT, RICHARD L. KELLEY and LARRY LATHAM,

Respondents.

BRIEF OF RESPONDENT, LINDSEY M. SCOTT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Must a 42 USC § 1983 plaintiff allege and prove that he has no adequate post-deprivation due process remedy and is he precluded, as a matter of law, from claiming § 1983 jurisdiction if he admits that he has a tort remedy under state law?

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JURISDICTION

This Respondent acknowledges that the petition for certiorari was timely filed but denies that it presents any of the considerations for certiorari outlined in Rule 17 of the Supreme Court. The question presented was not raised, or not properly raised, in the District Court and has not been decided by the District Court or the Circuit Court of Appeals. Further, the Eleventh Circuit's decision is not inconsistent with the authorities cited in the petition for certiorari.

Thus, the Court should deny the discretionary review requested.

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STATEMENT OF THE CASE

This Respondent adopts the statement of the case made by the United States Court of Appeals for the Eleventh Circuit and objects to Petitioner's statement,

insofar as it is inconsistent therewith. *Scott v. Dixon*, 720 F. 2d 1542 (11th Cir., 1983)

The District Court decided the case on summary judgment motions. It is procedurally significant that arguments on the motions were heard after the parties had announced ready at the call of the case for trial (R. Vol. 5, at 3, Transcript). The consolidated pre-trial order had previously been approved. (R. 536)

The Court of Appeals for the Eleventh Circuit, after reviewing the record, found there were genuine issues of material fact in the case and held that the District Court's order granting summary judgments to the Petitioner, Larry Dixon, and the Respondents, Richard L. Kelley and Larry Latham, was erroneous.

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REASON FOR DENYING THE PETITION

A. Summary of the Argument.

(1) The issue presented in the petition for certiorari was not, or not properly, raised in the District Court and has not been decided by either the District Court or the Circuit Court.

(2) The decision of the Eleventh Circuit is not inconsistent with the authorities relied upon by the Petitioner.

(3) *Parratt v. Taylor* does not stand for the principle asserted by the Petitioner.

B. Argument.

(1) The issue presented in the petition for certiorari was not, or not properly, raised in the District Court and has not been decided by either the District Court or the Circuit Court.

Petitioner contends the plaintiff must allege and prove that he has no adequate post-deprivation remedy under state law as a condition precedent to stating a cause of action and obtaining relief under 42 USC § 1983. In other words, so the argument goes, the plaintiff must attack as being inadequate any post-deprivation tort action he might have under state law and, if he fails to do so, Federal jurisdiction and § 1983 relief are precluded as a matter of law.

The denial of the performance or occurrence of a condition precedent is a special matter which a party must allege specifically and with particularity in his pleading. Rule 9(c), Fed. R. Civ. P.; *Lumbermen's Mutual Insurance Company v. Bowman,* 313 F. 2d 381 (10th Cir., 1963); *Evaluations Systems, Inc. v. Aetna Life Insurance Company,* 555 F. Supp. 116 (N.D. Ill., 1982). This was not done. Indeed, the issue presented in the petition for certiorari was never raised in any manner in the pre-trial order (R. 505-536) or the defensive pleadings. (R. 28-63, 76, 80, 83-86, 97, 137-152) In the pre-trial order, the petitioner simply stated:

> "[d]efendant, Larry Dixon, submits that this action is not properly brought as a § 1983 action and that it does not belong in Federal Court." (R. 505)

In his supporting brief, which was filed with the motion for summary judgment ten days before the pre-trial hearing, the petitioner said:

"[i]n *Parratt v. Taylor*, 68 L. Ed. 2d 420, the Supreme Court stated:

> 'Accordingly, in any § 1983 action, the initial inquiry must focus on whether the two essential elements to a § 1983 action are present; (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.'

> "It is the simple position of defendant, Larry Dixon, that this case does not belong in Federal Court. This in reality is nothing more than a casue (sic) of action based upon a common-law tort which is well-provided for under the tort law of Georgia. The laws of the State of Georgia in fact provide an ample tort remedy for the claim asserted by the plaintiff." (R. 360)

This is the closest the petitioner came in the trial court to raising the question presented in the petition for certiorari. However, that statement did not actually raise, or adequately raise, the issue. Even if it did, the Petitioner abandoned it in his oral argument when he said:

> "As it turned out, the defendant (sic) was probably deprived due process for the purpose of this motion. For the purpose of this motion, I think we will assume that the defendant (sic) was deprived of due process.
>
> "The question, though, is whether Mr. Dixon was acting under color of state law." (R. Vol. 5 at 6-7, Transcript)

In *Parratt v. Taylor*, 51 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), this Court's inquiry focused

> ". . . on whether the respondent, ha[d] suffered a deprivation of property *without due process of law.*"

(emphasis added) *Id* at 451 U.S. 538, 68 L. Ed. 2d 430, 101 S. Ct. 1914.

The Petitioner clearly waived that question. Significantly, the above-quoted statement by Petitioner's counsel was not made at an early stage of the litigation. To the contrary, it was made after he had announced ready at the sound of the case for trial. (R. Vol. 5, at 3, Transcript) Consequently, the District Court, in ruling on the motion for summary judgment, considered only whether the alleged deprivation occurred under color of state law and, after making specific reference to the above-quoted statement, the United States Court of Appeals for the Eleventh Circuit said:

> "[*w*]*e therefore look only to the question of state action.* (emphasis added)
>
> *Scott v. Dixon*, supra, at 720 F. 2d 1545.

Having obtained an adverse ruling on the state action question, the Petitioner now seeks to present a different issue to this Court by petition for writ of certiorari. This Court has generally declined to decide issues which are neither raised in the lower courts nor considered by the Circuit Court of Appeals and it should refuse to do so here. *Tacon v. Arizona*, 410 U.S. 351, 35 L. Ed. 2d 346, 93 S. Ct. 998 (1973); *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320 at 325, 32 L. Ed. 2d 95 at 100, 92 S. Ct. 1562 at 1565; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 at 147, 26 L. Ed. 2d 142 at 148, 90 S. Ct. 1598 at 1602-1603 (1970).

(2) The decision of the Eleventh Circuit is not inconsistent with the authorities relied upon by the Petitioner.

Parratt v. Taylor simply held that where state procedures would provide adequate redress, deprivations of

property due to *negligent* actions of state officials are not deprivations *without due process of law.* The Court recognized the impracticality, if not impossibility, of providing a meaningful and effective pre-deprivation procedure which could have prevented the loss of a prison inmate's $23.00 hobby kit and emphasized that the "deprivation" suffered by the inmate did not result from an established state procedure. The Court carefully explained the important distinction between a challenge to an established state procedure as lacking in due process and a property damage claim resulting from the negligence of state officers. Each of the other authorities relied on by the Petitioner recognized this distinction and emphasized that an effective pre-deprivation procedure was impossible under the circumstances involved. See *Palmer v. Hudson,* 697 F. 2d 1220, at 1222 (4th Cir., 1983); *Rutledge v. Arizona Board of Regents,* 660 F. 2d 1345, at 1352 (9th Cir., 1981); *Vicory v. Walton,* 721 F. 2d 1062, at 1064-1065 (6th Cir., 1983).

The liberty deprivation in this case occurred when a Clerk, pursuant to an established state procedure, issued a criminal arrest warrant. Pursuant to state custom or procedure, or because of the lack of an established state procedure, the warrant was given to the Petitioner, Larry Dixon, and not to law enforcement personnel authorized by law to execute warrants. The Petitioner kept the warrant for six months and then used it in an attempt to repossess a truck. Had state procedure mandated that judicial officers who issue warrants deliver them to those persons authorized by law to make service thereof, this could not have happened.

The Respondent challenged the state's procedure and alleged that the deprivations resulting therefrom were without due process of law. (R. 11-12, 67-68)

The Circuit Court found that:

> "*Dixon acted pursuant to a procedural scheme which permitted through its abuse the arrest of Scott for not paying a debt.* Dixon clearly acted in conjunction with and obtained significant aid from state officials. The evidence permits a conclusion that Dixon conspired with Floyd to obtain the warrant, acted in bad faith in securing it, and used his prior position to procure its execution. *The appellant in response to the motion for summary judgment asserted that Dixon and others knowingly misused state procedure in violation of Scott's civil rights and that the procedure itself was invalid.*"
>
> (emphasis added) *Scott v. Dixon,* supra, at 720 F. 2d 1546

Therefore, the Eleventh Circuit's decision in the case sub judice is not inconsistent with the authorities cited in the petition for certiorari.

(3) Parratt v. Taylor does not stand for the principle asserted by the Petitioner.

Petitioner's argument was soundly rejected by this Court long before *Parratt.* See *McNeese v. Board of Education for School District 187, Cahokia, Illinois,* 373 U.S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433; *Monroe v. Pape,* 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473.

In *Monroe,* the Court said:

> "[i]t is no answer that the state has a law which if enforced would give relief. The Federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the Federal one is invoked. Hence, the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present

suit in the Federal Court." *Id* at 365 U.S. 183, 5 L. Ed. 2d 503, 81 S. Ct. 482.

Parratt cited *Monroe* with approval and specifically said:

> "[o]ur decision today is fully consistent with our prior decisions." At 451 U.S. 544, 68 L. Ed. 2d 434, 101 S. Ct. 1917.

In a later decision, this Court explained *Parratt* thusly:

> "This argument misses Parratt's point. In Parratt, the Court emphasized that it was dealing with 'a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure.' . . . Here, in contrast, it is the state system itself that destroys a complainant's property interest . . . Parratt was not designed to reach such a situation . . . Unlike the complainant in Parratt, Logan is challenging 'the established state procedure' that destroys his entitlement without according him proper procedural safeguards.
>
> "In any event, the Court's decisions suggest that, absent 'the necessity of quick action by the state or the impracticality of providing any pre-deprivation process', a post-deprivation hearing here would be constitutionally inadequate. . . . That is particularly true where, as here, the state's only post-termination process comes in the form of an independent tort action."
>
> *Logan v. Zimmerman Brush Company,* 455 U.S. 422 at 436, 71 L. Ed. 2d 265 at 278, 102 S. Ct. 1148 at 1158 (1982)

It is therefore clear that *Parratt* does not stand for the proposition asserted in the petition for certiorari.

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CONCLUSION

This Respondent is strongly opposed to the petition for writ of certiorari and, for the reasons given above, prays that it be denied.

Respectfully submitted,

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